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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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No. _____

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Lawrence Yearsley and George Yearsley,

Petitioners,

vs.

W. A. Ross Construction Company, a corporation,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF OF PETITIONERS

—o—

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MAY IT PLEASE THE COURT:

The petition of Lawrence Yearsley and George Yearsley, respectfully shows to this honorable court;

A. Summary Statement of the Matter Involved.

The Eighth Circuit Court of Appeals has stated the question decided by it in the following language: "The vital question of this case is whether the building of the dikes of the Missouri River, which diverted the current, whch, after its diversion, eroded the plaintiffs' land; constituted an appropriation or taking of property, for which compensation should be made, or whether the loss suffered by plaintiffs was 'merely' a consequential damage incident to a public undertaking which must be borne without any right to compensation" (See Record, Page 183).

This cause was filed in the District Court of Otoe Coun-

ty, Nebraska, in July of 1937, and was removed on petition of the defendant, Ross Construction Company, to the United States District Court for the District of Nebraska, Lincoln Division (See Order of Removal, Page 8, Record). Thereafter, an amended petition was filed by the plaintiffs, Lawrence Yearsley and George Yearsley, petitioners herein. After issue was joined the case came on for trial before the Honorable Thomas C. Munger, United States District Judge, and the jury, May 18, 1938 (Record Page 23). Petitioners herein alleged that they were the owners of an undivided two-thirds interest of 250 acres of land and accretion land adjacent thereto, on the west bank of the Missouri river, in Section 31, Township 8, Range 15, Otoe County, Nebraska. The Nebraska Supreme Court in the case of *Topping v. Cohn*, 71 Neb. 559, decided an accretion case involving this very section of land. Reference to this case will show that the major portion of Section 31, including even the so-called deeded land of 250 acres involved in this case, has been built up by accretion since the original government survey in 1856.

Plaintiffs are citizens of the United States and have all qualifications required by statute to maintain this suit. The defendant did not make any claim to any ownership of the land destroyed nor did it claim that it or the United States Government had ever, by eminent domain or otherwise, obtained a right from plaintiff to erode or destroy this land. The defense was based upon the proposition that the work was done and performed under written contract with the United States Government and under the direction of the Secretary of War, supervision of the Chief of Engineers of the United States, for the purpose of improving the navigation of the Missouri river

as authorized by an act of Congress. That defendant was operating under a contract with the government, was admitted by plaintiffs in their reply. Plaintiffs, in their reply, alleged that the contract did not contemplate the taking of plaintiffs' land without just compensation and due process of law; that the contractor's acts resulting in the destruction of land were in violation of plaintiffs' rights under the 5th amendment to the Constitution prohibiting the taking of private property for public use without just compensation.

Some of the items of damage alleged were not submitted by the court to the jury and will not be referred to herein. So far as material at this time the case, as submitted to the jury, involves the damages to the plaintiff's land caused by the construction of dikes No. 602.7 and its trailer dike 602.7-A, and 601.9, each of which were constructed by the respondent, Ross Construction Company, through a contract with the United States Government, and by washing done by paddle boats of the defendant company in the construction of said dikes. The land washed away approximately 95 acres of the accretion land. The value and character of this land is the subject of testimony offered by both plaintiffs and defendant. It is indicated in the opinion of the Circuit Court of Appeals, and the evidence established that the two dikes built up the river above and the one dike opposite this land diverted the channel or current of the Missouri river from the Iowa shore to the Nebraska shore with the result that this diversion and the paddle washing eroded and carried away the plaintiff's land. The jury's verdict was in favor of the plaintiff in the sum of $806, and judgment was entered on the verdict.

Thereafter, an appeal was taken to the United States

Circuit Court of Appeals for the Eighth Circuit, and in an opinion entered May 10, 1939, written by Circuit Judge Sanborn (See Record, p. 180), the judgment in the District Court was reversed, the Circuit Court concluding that the District Court erred in failing at the close of the evidence, to direct a verdict in favor of the contractor.

The case chiefly relied upon by the Circuit Court in its decision is that of *Franklin* v. *The United States*, 101 Fed. (2d) 459. In his opinion, Judge Sanborn said, referring to the Franklin Case: "We are in complete accord with the conclusion reached in that case and the reasoning on which it is based. No useful purpose would be served by restating what has been so well expressed."

B. Reasons Relied Upon for Allowance of the Writ.

I

The decision of the Circuit Court of Appeals of the Eighth Circuit in the instant case is based upon the decision in *Franklin* v. *The United States* decided by the Sixth Circuit Court of Appeals, January 20, 1939 (See Record, pp. 184, 185).

II

Certiorari has been granted by the Supreme Court of the United States to review the decision in *Franklin* v. *The United States*, supra, presenting in substance the same question involved in this case. See orders of the Supreme Court of the United States entered May 15, 1939.

III

It would be unjust and inequitable for this court to deny certiorari in this case, having granted it in the Franklin case, thereby leave standing in full force, a decision based upon *Franklin* v. *The United States*,

which decision petitioners in the Franklin Case and in the instant case believe, will be reversed and vacated, by this court following the submission of the Franklin Case.

IV

The decision of the Circuit Court of Appeals of the Eighth Circuit is in conflict with the applicable decisions of this court and is in conflict with the principles of law established by decisions of this court.

V

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit decided a question of general importance as the decision related to the construction or application of the 5th amendment to the Constitution of the United States, and the decision did not give proper effect to the applicable decisions of this court.

VI

The opinion and decision of the United States Circuit Court of Appeals of the Eighth Circuit, results in the taking of the plaintiffs' property without just compensation and due process of law in violation of plaintiffs' rights under the 5th amendment to the Constitution.

VII

The Circuit Court of Appeals failed to give proper effect to the principles of law established by this Court in *Pumpelly* v. *Green Bay Company*, 80 U. S. 166; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Welch*, 217 U. S. 333; and *United States* v. *Cress*, 243 U. S. 316.

VIII

Jurisdiction of this court to consider this petition for writ is given by Section 240 of the Judicial Code (28 USCA Sec. 347).

C. Prayer For Writ

For these reasons it is respectfully submitted that this petition for writ of certiorari to review the decree and order of the United States Circuit Court of Appeals for the Eighth Circuit should be granted.

LAWRENCE YEARSLEY, and
GEORGE YEARSLEY,
Petitioners

W. L. Dwyer, of
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

We do not believe it necessary to prolong this brief with long citations of authorities. We shall only briefly refer to the authorities. It is evident from the opinion of the Eighth Circuit Court of Appeals as above suggested, that it relied upon the recent decision of Judge Allen in the Franklin case. The only distinguishing characteristic between the Franklin case and the Yearsley case is in the fact that in the Franklin case suit was brought against the United States, whereas in the instant case, suit was brought against the contractor. The Circuit Court of Appeals for the Eighth Circuit in the opinion in this case (See Record, pages 182, 183) directly held that plaintiffs were entitled to maintain this action against the contractor even though the work complained of was done under the authority and direction of the United States, and then stated that it was apparent that "The vital question of this case is whether the building of the dikes of the Missouri River, which diverted the current, which after its diversion erod-

ed the plaintiffs' land, constituted an appropriation or taking of property, for which compensation should be made, or whether the loss suffered by plaintiffs was "merely a consequential damage incident to a public undertaking which must be borne without any right to compensation."

It would, as we have hereinabove set forth, be inequitable and unjust for this court to review the Franklin case and ultimately, as we believe, to reverse the decision of Judge Allen in the case arising in the Sixth Circuit Court of Appeals, and to fail to take jurisdiction of this case, thus leave standing the decision depriving the Yearsleys, petitioners herein, of the award which the jury in the trial court gave them for their land which was taken under similar circumstances as in the Franklin case.

In the instant case evidence was adduced that by paddle washing some of the plaintiffs' land had been taken, and that issue was submitted to the jury, but in the view taken by the Eighth Circuit Court of Appeals, namely that the paddle washing had done nothing more than hasten the inevitable, namely the washing by the water deflected by the dikes, the fact that in this case paddle washing is involved is not and should not be sufficient, the court having granted certiorari in the Franklin case to deny it in the instant case.

We also call attention to the fact that whereas, in the Franklin case the erosion of the land did not take place until a year later; in the instant case, the land was eroded immediately as the dikes were constructed. Hence, in this case, the taking of the land was more direct and less consequential than in the Franklin case.

We have read the brief and argument presented by pe-

titioners Mabel Franklin and R. F. Graves in the Franklin case, supra, and adopt for the purpose of this brief, the argument set forth on pages 9 to 19 inclusive, as reasons why the decision in the Franklin case should be reversed in this Court. We submit that the dissenting opinion of Judge Hamilton in the Franklin case states the law applicable to this situation.

In the case of the *United States* v. *Lynah*, 188 U. S. 445, the Court said, among other things, "It is clear . . . that, were the government, by the construction of a dam or other public works, to flood lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the fifth amendment."

We submit that the construction of a dike under the circumstances outlined in the Franklin case and in this case is the construction of a public work and the erosion or washing away of plaintiffs' land is a destruction of the value of the land, so as to constitute a taking within the scope of the 5th amendment.

In the case of the *United States* v. *C. B. & Q. Ry. Co.*, 90 Fed. (2d) 161, decided by the Seventh Circuit Court of Appeals, in which certiorari was denied by this court, 302 U. S. 714, it was held:

> "The river bed is the land upon which the action of the water has been so constant as to destroy vegetation. It does not extend to, nor include the soil upon which grasses, shrubs and trees grow. *Harrison* v. *Fite* (C. C. A.) 148 F. 781. Beyond the Government cannot go without compensation for proximate damages."

In the Pumpelly case this court has said:

> "The argument of the defense is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequen-

tial result of such use of a navigable stream as the government has a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of an individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislature to change or control them, it shall be held that if the government refrains from absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not taken for public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at common law, instead of the government and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practice of our ancestors."

The Pumpelly case, the Cress case, the Lynah and the other cases on which we rely, the Sixth Circuit Court in the Franklin case and the Eighth Circuit Court in the instant case, attempt to distinguish as dam cases, saying the structure in the bed of the river went across the entire stream, whereas in the dike cases it merely diverts the current or shifts the channel and thereby in the dike cases the damage is consequential and not direct.

We submit that the taking is just as direct in the instant case as though a dam had been constructed across the entire river; that whether a dam is constructed or a dike is constructed, it is not the construction itself that

takes the property of the plaintiffs but it is the action of the water resulting from the construction of the structure in the bed of the river. In the dam cases the action of the water is that of backing up over the land, covering it, and thus rendering it valueless, whereby damages are to be paid. (See *U. S.* v. *C. B. & Q.*, 82 Fed. (2d) 131; *U. S.* v. *C. B. & Q.*, 90 Fed. (2d) 161; and the other cases hereinabove cited.) In the instant case except as plaintiffs' land was destroyed by the paddle boats, it was destroyed by the action of the water which was diverted by the dikes which eroded away the land.

Plaintiffs' land was eroded almost instantaneous with the extension of the dikes. Plaintiff testified that at times the dike came within 100 feet or closer of his land (see page 42 of the record). Thus, in point of time, the actual destruction of plaintiffs' land probably occurred quicker than the taking which has been compensated in the C. B. & Q. cases and in the dam cases decided by this court. It is thus not consequential damage but proximate damage. The Eighth Circuit Court in the C. B. & Q. case supra, has previous to this case defined consequential damages as follows:

> "Ordinarily 'consequential damages' are those which do not arise as immediate, natural and probable result of act done, but arise from interposition of additional cause, without which the act done would have produced no harmful results, while 'proximate damages' are those which occur directly and in natural sequence, and are specific results of the act done, without the intervention of independent cause."

We submit that this situation falls within the rule announced by this court in the Pumpelly case:

> "* * * that where real estate is actually invaded by superinduced addition of water, earth, sand or other material, or by having any artificial structure placed

on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

Pumpelly v. *Green Bay & Miss. Canal Co.*, 80 U. S. 166.

The record shows that the trial of this case continued from May 18th to May 28th (See Record, Pages 23-25). This gave the trial judge, Thomas C. Munger, ample opportunity in his usual diligent manner, to investigate the decisions of this court. We submit that the reasoning of Judge Munger in submitting this case to the jury on the instructions which are set forth on pages 166 to 173 of the Record and the dissenting decision of Judge Hamilton in the Franklin case, set forth the law as heretofore announced by this court, and that the opinion of the Circuit Court of Appeals for the Sixth and Eighth Circuit should be reversed.

We further submit in view of the fact that the court is taking jurisdiction of the Franklin case and the petition for certiorari filed therein, that it should likewise take jurisdiction of this case and set it down for argument at the same time that the Franklin case is argued.

Respectfully submitted,
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